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In the Matter of	)	
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<b>Implementation of the Commercial</b>	)	
<b>Spectrum Enhancement Act and</b>	)	WT Docket No. 05-211
<b>Modernization of the Commission's</b>	)	
<b>Competitive Bidding Rules and</b>	)	
<b>Procedures</b>	)	
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## Summary of Comments

MetroPCS Communications, Inc. (“MetroPCS”) is commenting in response to and in support of the *Further Notice of Proposed Rulemaking* (“*FNPRM*”) in the above-captioned proceeding.

MetroPCS supports the rule changes proposed in the *FNPRM* because there have been significant changes in the wireless broadband marketplace that merit an evolution in the designated entity program. First, the industry has undergone significant consolidation which has resulted in a handful of major national wireless carriers dominating the marketplace. Given this change, the public interest is best served at this time by modifying the designated entity program to benefit smaller carriers and new entrants who hold the promise of providing meaningful competition to the national wireless carriers. This is an ideal time to make a change because the Advanced Wireless Services (“AWS”) auction presents a unique opportunity for the Commission to promote new entrants. Ever since the D/E/F block PCS auctions were conducted in 1997, the inventory of newly available wireless spectrum has been limited. However, the upcoming AWS auction makes 90 MHz of spectrum available in *each market*. This presents a unique opportunity for the Commission take steps to promote new entrants, and the proposals made in the *FNPRM* serve this end.

Second, the ability of designated entities to raise capital has improved dramatically over the last several years and the Commission no longer needs to allow small and very small businesses to partner with large incumbent national wireless carriers to attract capital. As a result, the statutory objective of encouraging the participation of designated entities in the provision of facilities-based services can be met without having the large incumbent carriers become beneficiaries of the bidding discounts as well.

Generally, MetroPCS supports the proposals advanced by Council Tree Communications (“Council Tree”) in terms of the manner in which the proposed restrictions should be defined and applied.

Finally, MetroPCS urges the Commission to accord prospective applicants ample time after a decision is reached in this proceeding to assess the applicable rules and finalize their business plans. A minimum of 60 days should be allowed after the order in this proceeding is adopted and released before applicants should have to submit short form applications in Auction No. 66.

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MetroPCS Communications, Inc. (“MetroPCS”),<sup>1</sup> by its attorneys, hereby respectfully submits its comments in response to and in support of the *Further Notice of Proposed Rulemaking*, FCC 06-8, released February 3, 2006 (the “*FNPRM*”),<sup>2</sup> in the above-captioned proceeding. The following is respectfully shown:

MetroPCS is a dynamic, fast growing, rapidly expanding, facilities-based wireless telecommunications carrier that provides broadband wireless services to over 2 million

<sup>2</sup> *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211.

subscribers in a number of major metropolitan areas throughout the United States.<sup>3</sup> MetroPCS targets a market that is largely underserved by the national wireless carriers. MetroPCS offers wireless voice and data services on a flat rate, unlimited usage, no-contract basis, with rate plans beginning as low as \$30/month. These simple, “all-you-can-eat,” no-contract, pay in advance rate plans are clearly differentiated from the complex, multi-year, tiered, bucket plans offered by many other wireless carriers.

Based upon its experience and knowledge of the marketplace,<sup>4</sup> MetroPCS supports certain specific changes proposed in the *FNPRM*. However, MetroPCS harbors a concern that the Commission may be doing the right thing for the wrong reason. For example, MetroPCS rejects the rhetoric of those who claim that the designated entity program has been a failure, or is fraught with abuses and sham transactions.<sup>5</sup> The Commission consistently has subjected designated entity arrangements to careful scrutiny, and has not hesitated to deny designated entity benefits upon a finding that a non-eligible party exercised undue influence or control over a licensee.<sup>6</sup> Further, the Commission has been vigilant in insisting on changes to the various arrangements between the designated entity and its investors when the Commission is concerned

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<sup>3</sup> MetroPCS commenced service in the greater San Francisco, Sacramento, Miami, Tampa and Atlanta metropolitan areas and has demonstrated a substantial unmet market need in these areas. Now MetroPCS is expanding service into the Detroit and Dallas metropolitan areas on broadband PCS licenses acquired as result of the divestitures required by the Commission in the AT&T Wireless and Cingular Wireless merger. MetroPCS also is an investor in Royal Street Communications, LLC (“Royal Street”) which was granted licenses in Auction No. 58 in the Los Angeles and Orlando/Jacksonville/Gainesville metropolitan areas, among others.

<sup>4</sup> MetroPCS also has familiarity with the current workings of the designated entity program through its investment in Royal Street. Royal Street is a cooperative undertaking by entrepreneur Robert Gerard, the owner of C9 Wireless, and MetroPCS. Royal Street had the highest gross bids in Auction No. 58, and was granted licenses for the Los Angeles market as well as significant markets in the state of Florida. By virtue of this experience, MetroPCS is well attuned to the scrutiny which designated entity arrangements receive from the Commission.

<sup>5</sup> See discussion *infra* at pp. 3-5.

<sup>6</sup> *Baker Creek Communications, L.P.*, 13 FCC Rcd 18709, 18712 (PSPWD 1998).

that the designated entity may not have sufficient control. Thus, MetroPCS rejects the view that changes to the designated entity program are necessary because the program as previously implemented resulted in the grant of licenses to entities that were not entitled to preferences under the statutory scheme.

## **II. The Designated Entity Program Has Promoted the Statutory Objectives**

Section 309(j)(3) of the Communications Act of 1934, as amended (the “Act”) provides that the Commission shall seek to promote the following objectives in designing licensing rules:

(A) the development and rapid deployment of *new technologies, products, and services* for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including *small businesses*, rural telephone companies, and businesses owned by members of minority groups and women.<sup>7</sup>

Contrary to the claims of some critics, the objectives of Section 309(j)(3) of the Act have been advanced and the designated entity program has achieved some notable results. For example, MetroPCS is a designated entity success story. MetroPCS initially acquired licenses as a very small business designated entity in Auction No. 5. MetroPCS constructed systems in its licensed territories, began offering service to the public and quickly grew to the point that it no longer qualified to participate in new Commission auctions as a very small or small business designated entity or entrepreneur. In the process, MetroPCS has introduced new products and services to the market and has proven to be a substantial competitor. Within three full years after launch, MetroPCS was the second largest carrier in the Miami metropolitan area. MetroPCS has done

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<sup>7</sup> 47 U.S.C. § 309(j)(3) (emphasis added).

this by bringing innovative broadband wireless services to underserved segments of the public. Indeed, MetroPCS customers use their wireless phones more on average than customers of the other wireless carriers, and many use their MetroPCS handset as a substitute for wireline service. MetroPCS customer surveys indicate that approximately 40% of MetroPCS' customers use their MetroPCS service as their sole telecommunications service and a similar percentage of MetroPCS' subscribers are completely new to wireless. This means that MetroPCS is a significant new entrant, a serious competitor to existing wireless carriers, and a meaningful competitor to wireline carriers.

MetroPCS is not the only designated entity success story. There are a number of other successful designated entities which have made valuable and substantial contributions to the wireless marketplace. For example, Dobson Communications and Leap Wireless represent examples of very small businesses which have grown into substantial providers of facilities-based wireless telecommunication services throughout the country and no longer qualify to be designated entities in Commission auctions. Similarly, Cook Inlet, Alaska Native Wireless, Council Tree and Edge Wireless are eligible designated entities which have participated in multiple auctions over the years and have brought valuable services to the wireless marketplace. Finally, there are new designated entities as well, such as CSM Wireless, Royal Street, Wirefree Partners and Punxsutawney Communications which have recently entered the wireless arena.

These successes validate the Commission's designated entity program. Congress and the FCC properly recognized the benefit of having smaller entrepreneurial companies remain active in the development of spectrum-based services because they bring unique and innovative

products and services to the marketplace.<sup>8</sup> This has occurred, and as a result the designated entity program has had a positive influence on the wireless industry in the United States. However, the fact that the designated entity program has been beneficial does not mean that it should not change as the competitive landscape, financial markets and the industry consolidates and evolves over time.

### **III. Revised Designated Entity Rules Should Apply to the AWS Auction**

MetroPCS commends the Commission for taking steps to address possible changes in the designated entity program prior to commencing the AWS auction. As properly noted in the separate statement of Commissioner Adelstein on the *FNPRM*, “the upcoming [AWS] auction will be a landmark event for the Commission” because it represents “the first auction in almost ten years of a nationwide footprint of spectrum ideal for mobile services.” The 90 MHz of AWS spectrum represents a larger allocation than the initial A and B block cellular allocations, and equals the spectrum made available in the first *two* PCS auctions together which included the A, B and C Blocks. Indeed, the spectrum available in the AWS auction will increase by over 40% the total amount of spectrum available for broadband wireless services. In light of the significance of this AWS allocation, it is essential that the Commission re-examine whether the current rules continue to meet the statutory objectives of Section 309(j)(3) of the Act.

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<sup>8</sup> After all, much of the credit for today’s robust wireless service marketplace is attributable to upstarts from the early days of the industry such as Craig McCaw rather than to the large entrenched incumbent telephone companies that were given half of the cellular spectrum back in the days of the nonwireline/wireline Block A/Block B cellular allocation.

#### **IV. Changes In The Designated Entity Program Are Justified By Changed Circumstances**

In the early days of the designated entity program, the Commission sought to micromanage the nature and extent of the investments that large companies or financial institutions could have in a small or very small business designated entity applicant. For example, complex rules established a “25 percent equity exception”<sup>9</sup> and a “49.9 percent equity exception”<sup>10</sup> which set forth elaborate restrictions on the amount of equity that could be held by a non-eligible in a designated entity applicant, and the manner in which the interest could be held. Designated entity applicants complained that these rules were frustrating their ability to raise capital because they created artificial business structures.

The Commission was rightfully sensitive to these concerns about its designated entity rules and, in 2000, the Commission adopted a new, flexible “controlling interest” standard to supplant the prior rules.<sup>11</sup> The new standard provided designated entities considerable flexibility in how they designed their capital structure and allowed non-eligible investors to hold greater percentages of passive equity in an applicant than the prior rules. This change occurred shortly before the commencement of Auction No. 35 in which various C and F Block PCS channels were made available by the auction. As a consequence, Auction No. 35 was the first wireless

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<sup>9</sup> 47 C.F.R. Section 24.709(b)(1)(iii).

<sup>10</sup> 47 C.F.R. Section 24.709(b)(1)(iv).

<sup>11</sup> *See Amendment of Part 1 of the Commission’s Rules-Competitive Bidding Procedures, Order on Reconsideration of the 3rd Report and Order, 5th Report and Order, and 4th Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 15293 (2000).

auction in which major incumbent national wireless service providers ended up with significant (greater than 50%) equity positions in small business and very small business applicants.<sup>12</sup>

These rule changes, which enabled large wireless carriers to support designated entity applicants within the parameters of the controlling interest standard, were useful and beneficial because the financial markets were in turmoil with respect to telecommunications investments.<sup>13</sup> The capital markets were reeling from the NextWave bankruptcy and other high-profile telecommunications bankruptcies which were making it extremely difficult for telecommunications entrepreneurs to raise capital. Consequently, allowing large incumbent wireless players to enter into material relationships with small and very small business designated entities was a useful mechanism *at the time* for promoting the statutory objective of promoting the involvement of designated entities in the telecommunications marketplace.

Now, the situation has changed. The telecommunications finance markets have stabilized. Companies such as MetroPCS, Leap Wireless and others have validated innovative business plans that offer new products and services thereby demonstrating that new entrants operating on a local or regional level can attract capital and succeed. In sum the wireless industry is thriving. Further, industry consolidation has spawned a desire by the institutional investors in the telecommunications sector to find new companies to invest in because their existing investments are being cashed out in the course of the acquisitions by the national carriers. Accordingly, the Commission can now afford to place limits on the investments national wireless carriers are allowed to make in small and very small business designated entities who will receive bidding

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<sup>12</sup> For example, Auction No. 35 applicants Salmon PCS, LLC and Alaska Native Wireless LLC were majority owned by Cingular Wireless and AT&T Wireless respectively.

<sup>13</sup> One competitive local exchange carrier executive likened the financial capital markets situation at that time to a “nuclear winter.”

credits without fear of chilling the ability of smaller communications entrepreneurs to raise capital and precluding their participation in the AWS auction.

Another significant change in the wireless marketplace is the consolidation that has taken place and the extent to which the large national carriers have grown in size and market share. The *FNPRM* cites figures indicating that the top five wireless carriers today control approximately ninety percent of the United States wireless service subscribers, up from fifty percent from more than a decade ago.<sup>14</sup> In addition, the nationwide carriers have spectrum resources in virtually all of the top metropolitan areas in the United States. This was not the case in 2000 when the rules were changed in a manner which permitted significant investment by large carriers. At that time, the market was fragmented with 8-10 wireless carriers in the market and only a few carriers claimed (with some exaggeration) to have national footprints. Now, the national carriers have indicated in the context of their merger transactions that they approach the wireless market as a national market where prices are set and service offerings are developed across the board and are not individually tailored to specific markets. The result is that a small business or very small business that partners with one of these entities will not be a true new market entrant bringing innovative services and pricing to any market. Rather, the designated entity becomes an adjunct of the incumbent offering substantially the same services and, in some cases, in the same markets with the incumbent national wireless carrier. In essence, the growth in size and scope of the national carriers means that the small or very small businesses with which they partner will not be serving the core objectives of the designated entity program to

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<sup>14</sup> *FNPRM* at para. 8.

promote new entrants who will bring innovative new and unique services to the wireless telecommunications marketplace.

The Advanced Wireless Services (“AWS”) auction presents a unique opportunity for the Commission to promote new *facilities-based* entrants into the telecommunications market who will offer innovative new and unique services. In auctions held by the Commission since 1997, the inventory of wireless spectrum was limited, the opportunities for new entrants somewhat limited, and the uses and purposes to which the spectrum could be put were fairly limited.<sup>15</sup> However, the upcoming AWS auction puts 90 MHz of spectrum available in *each market*.<sup>16</sup> The Commission should not squander the opportunity to promote entry by small businesses and entrepreneurs which are unaligned with a major national carrier.

#### **V. The Proposed \$5 Billion Cutoff For Incumbent Carriers Is Reasonable**

The *FNPRM* asks interested parties to help the Commission define a “large in-region incumbent wireless service provider,” and seeks comment on the \$5 billion average gross wireless revenue standard advanced by Council Tree. MetroPCS submits that the \$5 billion average gross wireless revenue cutoff is reasonable and defensible. As MetroPCS understands it, the \$5 billion limit would encompass Verizon Wireless, Cingular Wireless, Sprint Nextel, T-Mobile, and Alltel within the definition.<sup>17</sup> These carriers are all substantially different in kind from the local and regional independent carriers that exist in the marketplace given the breadth

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<sup>15</sup> Although Auction 35 included substantial amounts of spectrum, the cloud over the auction limited the ability of new entrants completely unaffiliated from existing incumbent carriers to raise capital and, as Auction 35 and its aftermath played out, much of the opportunity for new entrants in the major metropolitan areas was eliminated as the licenses were reinstated to NextWave.

<sup>16</sup> Indeed, there is a substantial possibility that entirely new services outside the current wireless roadmap may be offered by new entrants.

<sup>17</sup> MetroPCS also presumes that the limitation will apply to these carrier’s affiliates – such as their wireline affiliates – as well.

of their footprints and the scope of their operations. The \$5 billion average gross wireless revenue cutoff is not “arbitrary” because it will affect only wireless carriers of sufficient size and scope that it is fair to keep them from receiving the benefit of designated entity bidding discounts. In addition, designated entities associated with national carriers will not be serving the core objectives of Section 309(j)(3) to promote new entrants and new technologies, products, and services. Further, limiting national carriers from using this program will encourage further dissemination of licenses to a broader array of licensees. Finally, limiting the participation of these entities will not materially harm the ability of designated entities to raise capital to compete with these carriers in the auction. Not only are the financial markets open to these new entrants, but the rule is not so restrictive as to prohibit designated entities from seeking funding from other carriers not impacted by the cutoff.

## **VI. Existing Concepts of “Significant Geographic Overlap” Should Be Retained**

The *FNPRM* asks whether geographic overlaps should be an element in establishing a material relationship for those who partner with large, in-region incumbent wireless service providers. MetroPCS believes that the significant geographic overlap standard is not necessary because the national carriers should be excluded by the cap even if a designated entity associated with them acquires spectrum in a market where they do not currently hold spectrum. This is because, as discussed above, the national carriers and by extension the designated entities associated with them see the wireless marketplace in terms of a national market. Accordingly, even if a designated entity acquires spectrum in a market where the national carrier does not currently hold spectrum, the designated entity is considerably less likely to introduce innovative new products and services to the market than a designated entity which is not associated with a national carrier.

However, to the extent that the Commission adopts a significant geographic overlap standard, MetroPCS strongly supports utilizing the existing standard set forth in Section 20.6 of the Commission's Rules rather than adopting a new standard. This will bring an element of consistency and certainty to this overlap standard because there are Commission precedents which interpret and apply the Section 20.6 making this standard an easy one to enforce.

Assuming that the Commission adopts a significant geographic overlap standard, MetroPCS strongly opposes allowing an incumbent or an applicant after the auction to divest interests in an overlap area in order to maintain eligibility for a bidding credit.<sup>18</sup> Allowing divestitures will significantly complicate the auction process and will increase the possibility of post-auction petitions and challenges that will delay the roll out of AWS spectrum. A simple "go-no go" rule at the time the short form (Form 159) applications are due will best serve the public interest by simplifying and expediting the process.<sup>19</sup>

## **VII. Timing of the AWS Auction**

The *FNPRM* observes that the rule changes adopted in this proceeding may become effective after the deadline for filing applications to participate in the auction given the current auction schedule. MetroPCS strenuously urges the Commission to avoid requiring applicants to submit applications before the rules are settled. Since the Commission has identified a possible need for changes in the designated entity program, the public interest will only be served if the Commission gets the appropriate changes in place before the AWS auction commences so that

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<sup>18</sup> See *FNPRM* at para. 18.

<sup>19</sup> The Commission also should make clear that parties are not entitled to amend their applications after the fact to remove licenses held at the time the short form application was filed to eliminate any overlap.

the very businesses the Commission hopes to help will in fact be able to meaningfully participate.

Furthermore, the Commission has a statutory duty to allow adequate time between the issuance of the rules and the commencement of the auction. Section 309(j)(3)(E) provides that the Commission in designing auction rules should

ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed (i) \*\*\* (ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.<sup>20</sup>

In light of this statutory admonition, the Commission cannot allow its desire to maintain the proposed AWS auction schedule to cause the designated entity rules to be in play when prospective applicants are finalizing their business plans and filing applications. For example, the *FNPRM* seeks comment on a proposal to require designated entity auction applicants “to certify their qualifications subject to the changed rules by amending any auction applications that are pending on the effective date of any rule changes adopted in this proceeding.”<sup>21</sup> Such a procedure will not serve the public interest and may deter participation by the very entities which the Commission is trying to help.<sup>22</sup>

MetroPCS intends to participate in the AWS auction either directly or through an investment in a designated entity. However, in order to participate, MetroPCS and/or any

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<sup>20</sup> 47 U.S.C. § 309(j)(3)(E).

<sup>21</sup> *FNPRM* at para. 1.

<sup>22</sup> MetroPCS understands that there may be legal reasons why the revised rules may not yet be effective or final prior to the time that applications are due. MetroPCS is most concerned that the Commission issue the rules at least 60 days before the applications are due --- if the rules still need to be published in the Federal Register and/or wait for finality --- MetroPCS would have no objection. However, if the applications are due *before* the final rules are even issued by the Commission, designated entities and their potential investors would have substantial issues.

designated entity will need to go to the capital markets to raise sufficient funds to participate in the AWS auction. Investors in wireless entities pursuing licenses in wireless auctions need to know the rules of the game prior to making their investment decisions. Financial lenders and investors hate uncertainty and potential applicants will not be able to raise the necessary funds on desirable terms if they are unable to demonstrate to prospective investors or financiers that the ground rules in the upcoming auction have been fully established and are well understood. If applicants are required to amend applications after the fact to come into compliance with designated entity rules which have not been released as of the date applications are due, this will have a significant chilling effect on investment and increase the prospect that smaller independent carriers will be disadvantaged. It would be an unfortunate irony if the changes to the designated entity rules ended up discouraging investments in designated entities and thus disadvantaged the precise group that is intended to benefit from the program.

MetroPCS notes that there is no external statutory requirement that the AWS auction commence on or about June 29, 2006. As MetroPCS has indicated in the AWS auction procedures proceeding, it favors having the Commission conduct the AWS auction sooner rather than later. Nevertheless, MetroPCS' overriding concern is that the rules be issued sufficiently in advance of any filing deadline so as to enable potential applicants, such as MetroPCS, to do rational business planning, to finalize a suitable auction strategy, to arrange the necessary capital, and to prepare and file an acceptable application. This cannot be done if the rules remain uncertain at the critical application date.

Based upon the foregoing, MetroPCS respectfully requests that the Commission allow a minimum of sixty days following the adoption of a *Memorandum, Opinion and Order* in this proceeding so that MetroPCS and other applicants can have adequate notice of the applicable

rules and requirements prior to submitting their short form (FCC Form 175) auction application.<sup>23</sup>

### **VIII. CONCLUSION**

In light of the foregoing, MetroPCS respectfully requests that the Bureau adopt auction procedures in conformance with these Comments.

Respectfully submitted,

**MetroPCS Communications, Inc.**

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<sup>23</sup> This should not pose a problem for the current auction schedule. In light of the accelerated comment and reply schedule in this proceeding, the Commission has a chance to complete its action in this proceeding during the month of March, which will allow the AWS auction to proceed largely on the current schedule.